

HATE SPEECH UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

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Good morning and thank you for inviting me to participate in this conference.

Today I would like to address a very important and novel topic in the Americas—the issue of hate speech. I will first discuss hate speech in general as it is treated by the American Convention on Human Rights. I will then turn to some of the lessons that we can take from other legal systems on the topic of hate speech, given that the Inter-American system has yet to speak in depth on this issue.

Hate speech can be defined by both its intent and its target. With respect to intent, hate speech is speech designed to intimidate, oppress or incite hatred or violence. This speech must also be targeted directly against a person or group based on characteristics like race, religion, nationality, gender, sexual orientation, disability or other group characteristic.

Historically, hate speech knows no boundaries of time or place. It has been used by officials in Nazi Germany, by the Ku Klux Klan in the United States, and by a full range of actors in Bosnia during the 1990s and during the 1994 Rwandan genocide. But when it is used, hate speech has a common thread: it is used to harass, persecute and justify the deprivation of human rights. At its most extreme, hate speech can even be used to rationalize murder, as the world saw just a few years ago in Rwanda.

In the wake of the German Holocaust, and with the rise of the Internet and other media that can spread hate speech almost instantaneously, many governments and intergovernmental bodies have tried to limit the harmful effects of hate speech. But these efforts naturally collide with the treaties, constitutions and domestic laws that guarantee the right to freedom of expression.

In this hemisphere, the American Convention on Human Rights provides for a broad measure of freedom of expression. Article 13 of the Convention guarantees the right to “seek, receive and impart information and ideas of all

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kinds”¹ through any medium. Article 13 then protects this freedom by banning prior censorship and indirect restrictions on speech and by allowing for subsequent imposition of liability under an extremely limited set of exceptions. Still, Article 13’s broad mantle of freedom of expression is not absolute. Like many international and regional agreements, the American Convention declares hate speech to be outside the protections of Article 13 and it requires States parties to outlaw this form of expression. Paragraph 5 of Article 13 provides the following:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered offenses punishable by law.²

Hate speech has also been the topic of joint discussions among the Special Rapporteur for Freedom of Expression and his counterparts from the United Nations and the Organization for Security and Cooperation in Europe (OSCE). The three rapporteurs, who often meet to discuss freedom of speech issues, have said that expression inciting or promoting “racial hatred, discrimination, violence and intolerance” is harmful and they noted that crimes against humanity are often accompanied or preceded by these forms of expression. The rapporteurs then stated that laws governing hate speech—given that they interfere with freedom of expression—should do two things. First, they should be provided by law. Second, they should “serve a legitimate aim as set out by international law and be necessary to achieve that aim.” Finally, the joint statement laid out the minimum guidelines for regulations on hate speech. These guidelines say the following:

- 1) no one should be penalized for statements which are true;
- 2) no one should be penalized for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- 3) the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- 4) no one should be subject to prior censorship; and

1. Organization of American States, American Convention on Human Rights art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 243 [hereinafter American Convention on Human Rights].

2. *Id.*

- 5) any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.³

Even though hate speech has been defined in the American Convention, the Inter-American Court and the Inter-American Commission have yet to interpret this area of the Convention in depth. It is useful, therefore, to look to the case law of the United Nations, European Court of Human Rights and other tribunals. These systems can help to illuminate the interpretation of this right in the Inter-American system.

Under international law beyond the Inter-American system, freedom of expression enjoys broad protection, but like in the Americas, it is not an absolute right. The International Covenant on Civil and Political Rights, or ICCPR, says that freedom of expression “carries with it special duties and responsibilities.”⁴ These duties and responsibilities are defined to include what is necessary to respect others’ rights or reputation or to protect national security, morals or public order. The ICCPR also restricts freedom of expression by prohibiting war propaganda and the advocacy of national, racial or religious hatred. The U.N. Human Rights Committee has provided further guidance on the issue of hate speech under the ICCPR in a number of cases, which I will discuss later.

The European Convention for the Protection of Human Rights and Fundamental Freedoms also provides for restrictions on freedom of expression. This Convention says that its freedoms may be subject to the formalities, conditions, restrictions or penalties as proscribed by law that are necessary, among other aims, to protect the reputation or rights of others. The European Convention therefore does not expressly address speech of national, religious or racial hatred. But the European Court has considered the issue in a series of cases.

The jurisprudence of the European Union (EU) and the United Nations (UN), including the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia, suggest a number of principles on incitement to discrimination and violence. These principles can serve as guideposts in determining how far hate speech can be restricted under the American Convention.

3. Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference, Contribution of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A.CONF.189/PC.2/24 (Mar. 22, 2001), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/00d640345f55da5dc1256a5300383afc/\\$FILE/G0112061.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/00d640345f55da5dc1256a5300383afc/$FILE/G0112061.doc) (last visited Feb. 16, 2006).

4. International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171

One of the key principles found in legal systems outside the Americas is purpose. The ICTR, for example, has found that if the purpose of the speech is bona fide, it does not constitute incitement. Bona fide purposes can include the search for historical truth or the dissemination of news and information. To determine purpose, tribunals have looked to the actual language of the speech at issue. In one case, the UN Human Rights Committee found that the use of the words “magic gas chamber” in relation to Nazi Germany suggested the motivation was racism, not the search for historical truth and thus it was not protected speech. The European Court has also touched on this area in the realm of national security. In several cases involving Turkey, the European Court drew a line between language explaining terrorist activities and language that promotes terrorist activities.

A second principle of international tribunals is the context of the speech. The European Court found, for example, that a Turkish mayor’s comments about massacres were hate speech because they were made at a time when massacres were taking place, and thus were likely to “exacerbate an already explosive situation.”⁵ The European Court has also looked at whether the speech is occurring in the realm of political expression or criticism of the government, since both of these areas enjoy greater protection. By contrast, the European Court has said that national security issues have a wider “margin of appreciation” for authorities to restrict freedom of expression.

A third principle that can be taken from international jurisprudence is causation. International jurisprudence has not traditionally required a direct link between the expression at issue and the demonstration of a direct effect. The European Court has found that even if the expression at issue did not cause particular violence, it could still be considered hate speech. ICTR has suggested that the question is not the effect, but what the likely impact might be, because causation may be relatively indirect.

With these three principles in mind, I would like to emphasize a couple of final points about the use of jurisprudence from outside the Americas in defining hate speech under the American Convention.

First, it should be noted that there is a discrepancy between the English and Spanish versions of Article 13(5). In English, the text notes that hate speech “shall be considered as offenses punishable by law.”⁶ This suggests that hate speech can only be regulated through subsequent imposition of liability. In Spanish, meanwhile, the text uses the word “*prohibir*,” meaning that hate speech is to be prohibited by law, and this suggests that censorship of hate speech might be possible. A resolution of this issue requires looking to international law sources for the means of interpretation, and here, the Vienna

5. Zana v. Turkey, 57 Eur. Ct. H. R. 2533 (1997).

6. American Convention on Human Rights, *supra* note 2.

Convention says that the full text of the article can be used to shed light on the meaning. If the full text of Article 13 is considered, it seems clear that paragraph 5 is governed by paragraph 2 and its imposition of subsequent liability. This view has been further supported by the Inter-American Court, which has said that censorship is only allowed for the purposes stated in paragraph 4. Hate speech, therefore, should be regulated like the other areas of expression in paragraph 2—through subsequent liability. The Inter-American Court has said that subsequent liability must fulfill four requirements.

- 1) there must be previously established grounds for liability;
- 2) there must be express and precise definition of these grounds by law;
- 3) third, the ends must be legitimate; and
- 4) fourth, there has to be a showing that the grounds of liability are “necessary to ensure” the aforementioned ends.⁷

Another point I would like to emphasize is that the jurisprudence of the UN and the EU should not be applied in a way that chips away at the Convention’s core freedoms. In particular, the Inter-American Court has said that if both the American Convention and another international treaty are applicable, “the rule most favorable to the individual must prevail.”⁸

Finally, I would like to highlight that Article 13(5) of the American Convention diverges from the ICCPR on a key point. The text of Article 13(5) discusses hate speech in relation to incitement of “lawless violence” or “any other similar action.”⁹ This suggests that the American Convention requires violence in order for speech to be hateful. The ICCPR and the European Convention, meanwhile, do not have any such requirement. The ICCPR outlaws speech inciting “discrimination, hostility or violence,” which suggests it covers a broader range of speech.¹⁰ The European Convention likewise allows for conditions and restrictions “necessary in a democratic society”¹¹ and then lists a number of ends justifying these limits such as national security and public safety. It can be concluded then that while the UN or EU jurisprudence on hate speech can serve as guidance, not every example found by these systems to be hate speech would qualify as hate speech under Article 13(5) of

7. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 (1985), available at http://www.corteidh.or.cr/serieapdf_ing/seriea_05_ing.pdf (last visited Feb. 16, 2006).

8. *Id.*

9. American Convention on Human Rights, *supra* note 2.

10. International Covenant on Civil and Political Rights, *supra* note 4, at art.20.

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221.

the American Convention. We must therefore be careful to apply the lessons of international tribunals only within the narrow limits allowed in this hemisphere.

In closing, I would like to emphasize again that the Inter-American Commission and the Inter-American Court have not yet considered the topic of hate speech, as they have done in the areas of criminal defamation and censorship. For this reason, the Office of the Special Rapporteur undertook an extensive study of this topic in other legal systems, and I have summarized some of this report's conclusions today. For more details on the treatment of hate speech in other judicial systems, I invite you to consult the 2004 Annual Report of the Special Rapporteur for Freedom of Expression.

Thank you very much for your attention. I welcome your questions.